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CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,

Petitioner,

against

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF
THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE
ALCOHOL TAX UNIT, TREASURY DEPARTMENT, HENRY
MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND
D. W. GRIFFIN, DISTRICT SUPERVISOR, ALCOHOL TAX
UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT
OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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D. W. GRIFFIN, DISTRICT SUPERVISOR, ALCOHOL TAX
UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT
OF NEW YORK

Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable Harlan F. Stone, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:*

The petitioner, THOMAS J. MOLLOY & Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of

Appeals for the Second Circuit filed in the above proceedings on July 7th, 1944 (R. 978), which judgment and decree affirmed by a unanimous Court the orders dated April 8th, 1942 (R. 914-920), May 18th, 1942 (R. 934-935) and August 6th, 1942 (R. 951-952) issued by the respondents.

I. Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit rendered by Augustus N. Hand, J., is reported in 143 F. (2d) 218 and is printed in the record (R. 971).

II. Summary Statement of Matter Involved

The matter involves orders issued by the respondents annulling, for alleged fraud, misrepresentation and concealment of material facts in its procurement, a basic permit as a wholesaler of distilled spirits, wine and malt beverages, issued under the Federal Alcohol Administration Act on July 1st, 1936 (R. 609) to the petitioner, an importer and wholesaler of liquors.

The petitioner was on May 25, 1935, and still is, the possessor and holder of a basic permit as an importer of liquors issued by the Federal Alcohol Control Administration on January 13, 1934 (R. 771).

A Wholesaler's Basic Permit was issued by the same authority to petitioner on July 1, 1936 (R. 609) on an application therefor dated October 26, 1935 (R. 601-608).

On April 8, 1942, the District Supervisor of the Alcohol Tax Unit of the United States Treasury Department issued an order, after hearings had, annulling the petitioner's Wholesaler's Basic Permit for fraud, misrepresentation and concealment of material facts in obtaining the said Wholesaler's Basic Permit.

Annulment proceedings had been brought and directed on similar grounds against both of the petitioner's basic permits, that is (a) the Wholesaler's Permit and (b) the Importer's Permit. The respondents, however, at the hearings withdrew the charges as affecting the Importer's Permit (R. 141). The hearings continued as to the Wholesaler's Permit and the proceedings directed against the Importer's Permit were accordingly dismissed (R. 879).

The orders appealed from annul the Wholesaler's Basic Permit for reasons which may be summarized as follows:

(a) That the applicant concealed material facts and made misleading statements in the application in that it misrepresented or concealed the full extent of the interests of principals and the sources and nature of the funds invested.

(b) That although SAMUEL M. BOMZON and THOMAS J. MOLLOY were represented as the true owners of stock, they held the said stock on behalf of SAMUEL RAPPAPORT and FRANK ZAGARINO who had, however, been disclosed in the application in the case of SAMUEL RAPPAPORT as Vice-President and director, and in the case of FRANK ZAGARINO as Treasurer, director and stockholder.

(c) That although there was a disclosure in the application as to SAMUEL W. RAPPAPORT as Vice-President and director; as to FRANK ZAGARINO as Treasurer, director and stockholder, respectively, the true extent and nature of their stock interest was not revealed.

(d) That although THOMAS J. MOLLOY was listed as President and director he did not perform the functions of those offices.

(e) That several of the stockholders and directors (all of whom had been fully disclosed in the application) had

not in the past been engaged in the business activities as stated by the application, but had been engaged at some time during the prohibition era in the illegal distribution of liquor.

The death of ZAGARINO prior to the issuance of the Wholesaler's Basic Permit eliminated from consideration in these proceedings any representations or interests in the applicant corporation concerning the said ZAGARINO (R. 952).

The application and affidavits for the basic permit in question were executed by THOMAS J. MOLLOY, the principal witness for the respondents (R. 92-104).

Petitioner has been conducting its wholesale and importing liquor business regularly since the issuance of both of the permits and pending the final determination of these proceedings.

There have been no charges or findings of illegality or irregularity on the part of petitioner or any of its officers, directors or stockholders since the issuance of the mentioned permits. The petitioner established a very substantial business. The record discloses that petitioner did a volume of over \$3,783,000 business during the year 1940, employing 153 employees (R. 471-472).

There were no findings that there were any persons interested in the petitioner corporation who had not been revealed to the Federal Alcohol Administration at the time that the application was filed. There was no evidence and consequently no findings that any of the directors or stockholders of the petitioner had ever been arrested or charged with a criminal offense, much less convicted of a crime. On February 4, 1937 (R. 683), January 12, 1938 (R. 685), March 7, 1938 (R. 695) and April 3rd, 1939 (R. 697) the stock of SAMUEL BOMZON in applicant corporation was formally transferred to SAMUEL W. RAFFAPORT. Notice of

this transfer was duly given to the Administrative Authority who acknowledged receipt thereof on February 9, 1937 (R. 684), January 20, 1938 (R. 686) and April 10, 1939 (R. 699). No objection to this transfer was made or indicated by the Federal Alcohol Administration.

III. Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28 Judicial Code and Judiciary, Section 347 (a) (Judicial Code Section 240 (a) amended and under Section 4 (h) of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. A. 204 (h)). The order and decree to be reviewed was filed on July 7, 1944 (R. 979). Upon application duly made by petitioner, an order was made by Mr. Justice Jackson, dated September 13, 1944 (R. 980), which extended the time to file this petition to December 5, 1944. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (U. S. C. Title 28, Section 350).

IV. Statute Involved

Section 3 of the Federal Alcohol Administration Act (49 Stat. 977), 27 U. S. C. (203), in substance makes it unlawful to operate a liquor business without obtaining a basic permit. Section 4 of the Federal Alcohol Administration Act, 27 U. S. C. 204, specifies who are entitled to basic permits. The relevant provisions are:

"Section 204. Permits

(a) Who entitled thereto. The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal Law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

* * * * *

(e) A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, * * * (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order."

V. Questions Presented

The following questions are presented:

1. Was petitioner entitled to a Wholesaler's Basic Permit as a matter of right under Section 4 (a) (1) of the Federal Alcohol Administration Act (Title 27, U. S. C. 204 (a) (1)) since it held on May 25, 1935, a basic permit as an importer of liquor issued by the Federal Alcohol Administration?

2. Does Administrative Regulation No. 1, Section 3 (b) of Article II (R. 909), illegally alter and restrict the Statutory provision (Section 4 (a) (1)) of the Act by limiting the

issuance of basic permits *to the same type or class* as that held by the applicant since the statutory provision makes no such restriction or limitation?

3. If petitioner was entitled to a Wholesaler's Basic Permit as a matter of right under Section 4 (a) (1), is the permit subject to annulment under Section 4 (e) (3) of the Act for alleged fraud, concealment and misrepresentation of the extent of the interest of the officers and stockholders in the corporation and their prior alleged illegal activities?

4. Would the Federal Alcohol Administrator have had power to refuse to issue the basic permit to the petitioner on the grounds of alleged illegal distribution of liquor by its stockholders or officers notwithstanding the statutory limitations on his power contained in subdivision A of Section 4 (a) (2) of the Federal Alcohol Administration Act which limits such grounds for refusal to issue a basic permit to convictions only, for the limited period of five years prior to the date of application, for a felony under Federal or State law and three years for a misdemeanor under Federal law only relating to liquor including taxation thereof?

5. Did subdivision B of Section 4 (a) (2) of the Federal Alcohol Administration Act empower the Administrator to refuse a permit to petitioner on the grounds of alleged illegal transactions in the distant past on the part of some of the officers, directors and stockholders notwithstanding the Administrator's explicit limitations in subdivision A of the said section and the legislative history and context of the section?

6. Since subdivision B of Section 4 (a) (2) of the Federal Alcohol Administration Act refers to the applicant person and not to its officers, directors and stockholders where the

applicant is a corporation, as does the preceding subdivision of the section, was the Administrator under said subdivision of the section restricted, for the purpose of determining commercial qualifications of the applicant, to ascertainment of the business experience, financial standing or trade connections of the corporate applicant as such, as distinguished from the moral background of its officers, stockholders and directors as covered by subdivision A of the said section?

7. Were the alleged concealments or misrepresentations material in the light of the restricted statutory powers of the Federal Alcohol Administrator?

VI. Reasons for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

A. As To Amendment and Restriction of the Statute by Administrative Regulation.

Section 4 (a) (1) of the Act (Title 27 U. S. C. 204 (a) (1)) provides in plain and clear language that the holder of a basic permit as a distiller, rectifier, wine producer or importer on May 25th, 1935 is entitled as a matter of right to another basic permit. It does not limit the type of other basic permits to which a holder is entitled.

The Administrative Agency has, however, by its Regulation No. 1, Section 3 (b) Article II, limited the statutory right to basic permits of the same class only (R909).

The Circuit Court of Appeals has failed to follow the clear language of the statute and has based its decision in this respect on the import of the said Administrative Regulation (R973). The Court has thereby ruled in effect that an Administrative Agency may by regulation alter, amend

or extend a statute. Its decision to that extent failed to follow and is in conflict with the rules established by this Court in *Morrill vs. Jones*, 106 U. S. 466; *United States et al vs. Missouri Pacific Railroad Co.*, 278 U. S. 269; *United States vs. Goldenberg*, 168 U. S. 95; *Palmer vs. Hoffman*, 318 U. S. 109, 114; *Addison vs. Holly Hill Fruits Products, Inc.* 64 Sup. Ct. 1215, 217 Last Term, decided June 15, 1944.

The Court in these cases firmly established the rule that where no ambiguity exists there is no room for construction and further, that an Administrative Agency cannot by its regulation put into the body of a statute a limitation which Congress did not think it necessary to prescribe.

B. As to subdivision B of Section 4 (a) (2) of the Federal Alcohol Administration Act.

1. *Statutory Construction.* The Circuit Court of Appeals in this case has construed subdivision B of Section 4 (a) (2) of the Act to mean in effect that the Administrator of the Act is vested with a power of discretion to refuse a basic permit to an applicant who in his prophetic opinion is not likely by reason of his past experience to maintain operations in conformity with Federal law. The construction of the term "business experience" as used in said section is said in effect by the Court to include experience involving violation of law in the distant past on the part of the applicant. This despite the fact that subdivision A of the same section by discriminating language limits the power of the Administrator to refuse permits to applicants who have been convicted within five years of a felony or within three years of a certain class of misdemeanor. Such construction places a greater burden upon a person who has not been convicted of a crime than upon one who has been convicted more than five or three years respectively prior to the date of the application. It therefore leads to absurd conse-

quences. To that extent the decision of the Circuit Court of Appeals is deemed to be in conflict with the decision of this Court in *United States vs. Katz, et al*, 271 U. S. 354.

2. The ordinary and common accepted meaning of the terms "business experience" and "trade connections" as used in the context of subdivision B of Section 4 (a)(2) of the Act are *commercial* in nature. The construction of these terms in a manner which vests in the Administrator a power of discretion to refuse a permit to an applicant on *moral fitness* grounds is contrary to the rulings in the cases of *Addison vs. Holly Hill Fruits Products, Inc.* (supra); *Morrill vs. Jones* (supra); *Old Colony Railroad Company vs. Commissioner of Internal Revenue*, 284 U. S. 552, 560. This court, in the above cases, held that Congress must be presumed to have used words in their ordinary signification and that the material meaning of words cannot be displaced by retrospective expansion of meaning.

3. The decision of the Circuit Court of Appeals vests discretionary power in the Administrator to refuse a basic permit where there is some evidence that the applicant in the distant past, not circumscribed by time, committed law violations, which did not result in convictions. Such a construction and the power appropriated thereunder is unreasonable, arbitrary and capricious, with no relation to the object sought to be attained and is in violation of due process under the Fifth Amendment to the Constitution, and in conflict with the decisions of this Court in *Nebbia vs. Peo. of the State of New York* 291 U. S. 502; *Currin vs. Wallace* 306 U. S. 1, 14.

The Administrator's authority for refusal of a basic permit to an applicant because of alleged illegal activities in the past is defined and limited clearly in Subdivision A of Section 4 (a)(2) of the Act and so is definitely fixed by statutory time limitation. The ruling by the Circuit Court

of Appeals that under subdivision B of the section there is authority for denial of a basic permit because of law violations, let alone convictions, is contrary to the plain statutory language. This statutory language prescribes the use of discretion in passing on the applicant's qualifications based on "business experience", "financial standing" or "trade connections".

A construction of the Statute as urged by the petitioner, which limits the authority to refuse a basic permit under subdivision A of Section 4 (a) (2) of the Act because of past convictions within the prescribed statutory time (*moral fitness grounds*) or under subdivision B of the section on the basis of inadequate *commercial* qualifications, is in accordance with the clear meaning of the Statute. It thus attains the Legislative objects and intent and so avoids denial of and conflict with due process under the Fifth Amendment of the Constitution.

This Court has ruled that a statute should be construed so as to maintain its constitutionality and insofar as the lower court's construction conflicts with this rule it fails to follow this Court's decision in *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 96.

2. The Circuit Court of Appeals has decided an important question of federal law, important to the administration of the statute, which has not been but should be settled by this Court.

A. The court below has construed subdivision B of Section 4 (a) (2) of the Act to mean that the Administrator is vested with broad unlimited discretionary power to prophetically determine whether an applicant is possessed of sufficient *moral* stamina to enable it to maintain operations in conformity with Federal Law.

Yet the context of Section 4 of the Act and its legislative history (74th Congress, Record page 11714 House Con. Re-

ports 1898 H.R. 8870 Vol. 4, p. 10) shows Congressional intent to circumscribe the power granted by the Act. It is plain that by the Act, authority was granted and the power carefully and by discriminating language limited under Subdivision A of Section 4 (a) (2) of the Statute to decline basic permits on defined *moral fitness* grounds, limited as to class of offense and time of conviction therefor. Under subdivision B of said section, the authority to refuse a permit is limited to *business* or *commercial* inadequacies.

The construction of the statute by the Circuit Court of Appeals, however, vests in the Administrator power to refuse a basic permit for alleged misdeeds unlimited as to time or nature and in complete disregard of the applicant's current uprightness and integrity, all in direct violation of Congressional intent and recognition as manifested by the legislative history of the Act and the clear language thereof.

Such construction results in a nullification of subdivision A of Section 4 (a) (2) of the Act and adds to the statute by judicial construction an additional ground for denial of a permit. Therefore, a question of Federal Law is posed which is of national importance in the administration of the Federal Alcohol Administration Act, and which has not been but should be settled by this Court.

B. The answer to the questions herein presented affect numerous applicants and holders of permits throughout the United States. The public importance of the question is, therefore, obvious and calls for an expression and construction by the highest Court of the land. Research fails to disclose that this Court has yet construed this section of the Statute under consideration by this petition or judicially commented on the powers exercised thereunder by the Administrator, although the construction and proper exercise of power thereunder governs the issuance and revocation of permits involving a large number of business owners

located throughout the Nation, employing thousands in help and affecting investments of many millions of dollars. This Court will grant a writ of certiorari where an interpretation of an important provision of a Federal Statute and the powers of a Federal Administrator thereunder are involved. It has likewise been held that such a writ will be granted where a decision with respect to the enforcement of such a statute and such powers constitute a precedent of general application. *Del Vecchio v. Bowers*, 296 U. S. 280, 285.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and the judgment and decree of the Circuit Court should be reversed.

WALTER BROWER,
Counsel for Petitioner.

COLEMAN GANGEL,
Of Counsel.